United Nations

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 906

Case No. 992: ZIADEH

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Julio Barboza; Mr. Kevin Haugh;

Whereas, on 24 July 1997, Samih Ziadeh, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 2 November 1997, the Applicant, after making the necessary corrections, again filed an application, requesting the Tribunal:

"...

2. [To order] the reinstatement of [the Applicant's] previous post with UNRWA.

3. To consider the period from 9.3.1996 to date as leave with full pay.

4. [To award] compensation for moral and psychological distress."

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Whereas, on 19 January 1998, the Executive Secretary of the Tribunal informed the Applicant that it is up to the Applicant to state the amount of compensation that he is requesting;

Whereas, on 28 February 1998, the Applicant submitted an additional document expanding on his plea for compensation, in part, as follows:

> "... If I had continued work with the Agency until retirement on age ground (year 2012), this means that 14 years of work have been lost the total then will be $205.128.
>
> ... my health insurance was terminated which is now costing me about JD500 ($700/month = $8,400/year) ..."

Whereas the Respondent filed his answer on 30 June 1998;

Whereas, on 6 November 1998, the Tribunal put questions to the Respondent, to which he provided answers on 11 November 1998;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Agency on 1 October 1983, as Medical Officer "B" (Part Time), at grade 14, in the Jarash Camp Health Centre. On 1 January 1986, the Applicant was granted a temporary indefinite appointment as an area staff member in the capacity of Medical Officer "B" (Relieving) at grade 14, in the Jordan Field. On 1 October 1986, he was transferred to the post of Medical Officer "B", in the Baqa'a Camp Clinic, Balqa Area. He was subsequently transferred to a number of other offices in the region. The Applicant separated from service on health grounds with effect from 5 March 1996.

On 22 July 1992, the Applicant underwent a kidney transplant operation. On 27 August 1992, a medical board convened to examine the Applicant and determine his fitness for continued service with the Agency. On 11 November 1992, the medical board concluded that the Applicant was "fit for continued service with the Agency", and

recommended "re-evaluation after three months". During the period between 4 February 1993 and 16 January 1995, five other medical boards re-evaluated the Applicant. Each medical board concluded that the Applicant remained fit for continued service with the Agency; each medical board recommended re-evaluation of the Applicant's condition after six months.

On 19 July 1995, the Applicant was examined by another medical board, which concluded on 19 September 1995, that the Applicant was fit to resume his duties with the Agency. The medical board recommended re-evaluation after one year. It further noted in an attached confidential letter to the Chief, Field Health Program, Jordan, as follows:

> "The present post of [the Applicant] ... requires continued mobility and travel within the Area throughout the scholastic year.
>
> Although [the Applicant] was declared fit by the Board, [the Applicant] was found to suffer from avascular necrosis of the head of the femur, both sides, which renders him more vulnerable to fracture.
>
> Therefore, in order to avoid the probability of in-service accidents that might result from mobility and travel, the Board recommends that [the Applicant] be stationed in a Health Centre."

On 28 September 1995, the same Medical Board was re-convened and "re-reviewed the reports and investigations concerning [the Applicant]." On 1 October 1995, the Medical Board submitted to the Chief, Field Health Program, Jordan, its conclusions that "[the Applicant was] UNFIT to resume his duties with the Agency" and that "[t]he provisions of para. 7 of staff rule 109.7 do not apply in his case." On 2 October 1995, the Field Health Officer concurred with these conclusions.

On 23 October 1995, the Applicant requested the Director of UNRWA Affairs and the Director of Health to review the decisions to declare him unfit for continued service and to terminate his appointment. The Applicant enclosed medical reports from specialists in support of his claim that he was fit for service.

On 30 October 1995, the Director of Health informed the Applicant that he had reviewed the Applicant's file and was "confident that the decision taken based on the recommendation of the Medical Board which examined you on 1 October 1995 was sound and in your best interest." The Director of Health noted in particular that the Applicant was receiving immuno-suppressive treatment following his kidney transplant surgery and that the Applicant had developed a vascular necrosis of the head of the femur. The Director of Health concluded that the Applicant would be vulnerable to fractures and to contracting infections during the performance of his duties.

On 2 November 1995, the Acting Director of UNRWA Affairs, Jordan, wrote to the Applicant, confirming that the Applicant's service with the Agency would be terminated "on medical grounds at the expiry of [his] accrued annual and sick leave entitlements, i.e. with effect from close of business on 5 March 1996." On 5 November 1995, the Applicant requested a review of that decision.

On 7 November 1995, the Acting Director of UNRWA Affairs, Jordan, informed the Applicant that, having thoroughly reviewed the case, he "found nothing to add to [his] letter ... dated 2 November 1995, i.e. [the Applicant's] services [would] be terminated on health grounds with effect from close of business on 5 March 1996, with payment of all [his] entitlements in due time."

On 22 November 1995, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 31 March 1995. Its evaluation and recommendation read as follows:

"...

> (b) By reference to the Administration's reply, the Board noted that the decision to terminate the Appellant's services on health grounds was fully justified and was not motivated by prejudice or bias.
>
> (c) The Board here noted that there had been six medical boards that recommended that the Appellant was fit for work. Furthermore, the Board noted that the last medical board dated 19.9.1996, recommended that the

Appellant was fit to resume his duties with the Agency, and that he is recommended for re-evaluation after one year and was supported by the Deputy Chief, Field Health Programme, Jordan, on 25 September 1995.

(d) On 1 October 1996, another medical board was held to evaluate the Appellant's condition. The Board here believes that this Board did not complete the legal procedures for a new medical board i.e. the Chief, Field Health Programme, Jordan, did not issue a memorandum for a new board to be held nor did he justify the continuance of the last board after it submitted its recommendation. Also the Board noted that the report of the Board of 1 October 1996, was the same as the report for 19 September 1996, the only difference was the word **unfit**. (Did the Medical Board have the authority to re-review their conclusions at any time they found it suitable?)

In this context the Board is of the opinion that the Appellant was treated unfairly.

IV. RECOMMENDATION

17. In view of the foregoing and without prejudice to any further oral of written submission ..., the Board unanimously makes its recommendation that the administrative decision appealed against be reviewed."

On 3 July 1997, the Commissioner-General transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Board noted that the last Medical Board which examined you initially declared you fit for duty with the Agency and that [the] C/FHP [Chief, Field Health Programme] supported this conclusion. Further, it noted that later the same Medical Board, having already submitted its report, met again without being formally convened. It submitted an identical report to its initial report, except that the conclusion was different. The Joint Appeals Board was, as a result, of the opinion that you were treated unfairly and recommended that the administrative decision be reviewed. The Joint Appeals Board did not consider your claim that your illness was attributable to service.

On the primary claim, namely whether you were unfit for service, I agree that the procedures of the Medical Board appear to have gone awry; however, that does not mean that you have been treated unfairly. Your appeal concerns the

correctness of the opinion of the Medical Board as to your fitness for duty. I accept that the medical opinion is correct. In doing so, I have relied on a review of the Medical Board's reports by the previous and the current Directors of Health. Your employment with the Agency could expose you to occupational hazards due to the side effects of immuno-suppressive treatment. There is no other vacant post for which you are qualified. Accordingly, I do not accept the Board's recommendation and your appeal is dismissed.

In relation to your claim that your illness was attributable to service on behalf of the Agency, in the absence of any administrative decision to deny you compensation or review as required by the Rules, this aspect of your appeal was not receivable by the Joint Appeals Board. Further, you did not comply with the claims procedure in the Rules. Indeed, notwithstanding that your illness was contracted in 1992 at the latest, at no time until your appeal in November 1995 did you claim it to be attributable to service. Accordingly, notwithstanding that this issue was properly not considered by the Joint Appeals Board, I rejected your claim as to the Agency's responsibility for your medical condition.

..."

On 2 November 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent improperly rejected the JAB's recommendation, particularly since the Respondent has admitted that the Medical Board's procedures "appear[ed] to have gone awry".

2. The decision to terminate the Applicant on health grounds was improper because the Applicant was found not to be physically unfit but, rather, to be at risk of exposure to health hazards.

3. The Applicant is fit for service with the Agency, as his surgeon has confirmed that he can work without restrictions.

Whereas the Respondent's principal contentions are:

1. The Respondent has broad discretion to terminate the appointment of a staff member if such action would be in the interest of the Agency.

2. The Applicant has failed to show that the Respondent's decision was prompted by an improper motive.

3. The proceedings of the Medical Board were not unfair and there is no evidence that its change of opinion was motivated by any improper purpose.

4. The Respondent is entitled to determine the fitness of the Applicant for service based on the Medical Board's conclusions and recommendations.

5. The Applicant failed to quantify precisely his claim for compensation or to provide evidence of his present earnings for the purpose of mitigating damages, and therefore, he is not entitled to any compensation.

The Tribunal, having deliberated from 5 to 20 November 1998, now pronounces the following judgement:

I. Having carefully considered the pleadings and the documentation in this case, the Tribunal makes the following findings:

1. That between 27 August 1992 and 19 September 1995, the Applicant's health had been examined and reviewed by no less than six medical boards, all of which had concluded that he was fit to work in the medical service of UNRWA.

2. That on all such occasions, his fitness for service was determined by reference to his capacity to discharge his functions in an acceptable manner and that both the Applicant and the Respondent had considered this the primary consideration whereby his condition should be assessed.

3. That no new medical evidence became available to the Medical Board between the Report of the Medical Board dated 19 September 1995, when it reported the Applicant as being "fit to resume his duties", and the Report dated 28 September 1995, when the same Board had reconvened to review the Applicant's case and found him "unfit to resume his duties". The same information it previously considered served as the basis for the new conclusion. The Applicant experienced no substantial or relevant deterioration in his condition between those dates which would have entitled the Board to change its original conclusion from "fit to resume his duties" to "unfit to resume his duties".

4. That the reconvening of the same Medical Board and the reconsideration by it of the Applicant's fitness for service had been inspired by the Respondent. The Respondent rejected the Board's first conclusion *not* on the grounds that there was new evidence that the Applicant was unfit to resume his duties. Rather, the Respondent believed that the Applicant would be unable to discharge his duties because his medical condition made him susceptible to easily fracturing his femur, each of which was weakened by avascular necrosis, and because the immuno-suppressive medication that he needed to take made him vulnerable to developing an infection. Thus the Respondent feared that the Applicant might suffer a service-incurred injury or other service-related illness, which would expose the Respondent to adverse financial burdens and would constitute "an unnecessary and undesirable outcome".

5. That none of the specialists whom the Applicant consulted, including the two to whom the Applicant had been referred by the Agency, had concluded that he was unfit.

6. That between 19 September and 28 September 1995, the Applicant was never apprised of the reasons why his case was being reconsidered, i.e., the Applicant's potential exposure to a service-incurred injury or illness or the potential financial consequences to the Respondent. The Respondent appears to have changed the interpretation of "unfit for duty" without giving notice of such change in definition to the

Applicant, so as to deny him an opportunity to challenge the application of such definition to his case and to deny him the opportunity of adducing evidence or making presentations that he was not "unfit" within the widened definition.

II. Based on these findings, the Tribunal concludes that the Applicant was denied the right to participate in any meaningful way in the Medical Board's reconsideration of his fitness for service. He was denied his right to furnish evidence thereon or to challenge any evidence which may have been adverse to him. The Applicant was thus denied the rights protected by the principle of "audi alteram partem", being analogous to the right to confront one's accusers. In short, the Applicant was denied due process.

III. The Tribunal is further concerned as to the inadequate content of the report of the Medical Board dated 28 September 1995, in that it repeats verbatim the earlier report of 19 September 1995, when it declared him "fit to resume his duties". The only difference in the 28 September report is that the word "unfit" has been substituted for the word "fit". The Medical Board does not explain its reasons for such a "volte-face". It stated no ascertainable reasons for the change in its conclusion, so as to enable anyone to understand why such change was made. Since all of the medical evidence from the specialists was to the effect that he was fit, the Tribunal can only assume it found him"unfit" because of the new and expanded definition. Likewise, the Respondent's reasons for accepting the later conclusion, rather than the original conclusion that he was fit for duty, made by the very same Board, are difficult, if not impossible, to ascertain. The failure to detail such reasons severely disadvantages the Applicant in his ability to make representations and to adduce contrary evidence. The Tribunal is satisfied that due process requires that such a report be transparent and should state reasons so as to allow a dissatisfied staff member to challenge its contents. The Tribunal is satisfied that this general principle is applicable to all administrative decisions that are subject to review.

IV. The Tribunal is further concerned that the very persons who orchestrated or inspired the re-convening of the Medical Board were those who ultimately inspired the decision to separate the Applicant from service on the grounds that he was unfit for service. This situation might bring about the perception that bias or prejudice tainted the termination of the Applicant's appointment.

The Tribunal is also concerned that because the Applicant had not been apprised that his fitness or otherwise was now being judged under the new and expanded definition, he may have been denied the opportunity of seeking an agreement or compromise which might have been acceptable to both parties.

V. The Tribunal is satisfied that for the reasons stated, the Respondent deprived the Applicant of both fairness and due process in the procedures that eventually led to the Respondent's decision to separate the Applicant from service on the grounds of health. The Tribunal has considered the Applicant's request for reinstatement but considers this not to be an appropriate remedy. First, the Tribunal is not satisfied that had the procedures been correct and fairly conducted, the decision of the Medical Board and the Respondent's acceptance thereof would have been different. Second, the circumstances have obviously changed since the Applicant was separated. The Applicant has been in private medical practice since his separation, and substantial separation benefits have already been paid to the Applicant. The Tribunal therefore considers that the payment of compensation would be a more appropriate remedy than reinstatement.

VI. For the foregoing reasons, the Tribunal:

1. Orders that the Respondent pay to the Applicant compensation in the amount of two years net base salary at the rate in effect on the date of the Applicant's separation from service, and

2. Rejects all other pleas.

(Signatures)

Hubert THIERRY
President

Julio BARBOZA
Member

Kevin HAUGH
Member

New York, 20 November 1998

R. Maria VICIEN MILBURN
Executive Secretary